Appeal No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,
Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY;
MELVIN L. WATT,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:16-cv-03113

RESPONSE TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Patrick J. Collins, et al. v. Steven T. Mnuchin, et al., No. 17-20364

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

Plaintiffs seek *en banc* review of the panel's holding that the Housing and Economic Recovery Act ("HERA") bars their Administrative Procedures Act claims challenging a transaction between the Federal Housing Finance Agency, as Conservator for Fannie Mae and Freddie Mac (the "Enterprises"), and the U.S. Department of the Treasury. That holding, however, reaches precisely the same outcome as decisions from the D.C., Sixth, Seventh, and Eighth Circuits rejecting the same claims. Moreover, the Supreme Court already has declined review of the issue. Plaintiffs offer no valid basis for rehearing; the law on this issue is settled, and a contrary result by this Court sitting *en banc* would draw it into conflict with four other circuits.

Plaintiffs also seek *en banc* review of the panel's holding regarding the remedy for their separation-of-powers claim. The panel found that various aspects of FHFA's structure, including leadership by a single Director removable only for cause, cumulatively violate the constitutional separation of powers. But the panel held that the remedy is to excise the for-cause removal limitation, giving the President plenary authority to remove an FHFA Director going forward—not to invalidate prior FHFA actions like the one challenged here.

As explained in a separate petition for rehearing *en banc* filed by FHFA, the panel's holding on the *merits* of the constitutional issue was novel, wrong, and

inconsistent with decades of precedent upholding the constitutionality of independent agencies, including a recent decision of the *en banc* D.C. Circuit. But the panel's *remedial* analysis is undoubtedly correct and squarely in line with precedent. Plaintiffs identify no decision of the Supreme Court, this Court, or any other Circuit suggesting, let alone holding, that invalidation of prior agency action is the remedy for the type of constitutional violation alleged here. Thus, neither issue raised by Plaintiffs is worthy of *en banc* review.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiffs, Enterprise shareholders, challenge an amendment to a securities agreement between FHFA, as Conservator of the Enterprises, and Treasury. Plaintiffs contend that this amendment (the "Third Amendment") favored Treasury and harmed the value of their stock.

Since 2013, similar suits have been filed in federal district courts across the nation. These suits, generally asserting claims under the APA, have failed. *See, e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 604-16 (D.C. Cir. 2017); *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Roberts v. FHFA*, 889 F.3d 397 (7th Cir. 2018); *Saxton v. FHFA*, --- F.3d ---, 2018 WL 4016851 (8th Cir. Aug. 23, 2018); *Continental W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015). The Supreme Court denied petitions for certiorari in several of these cases.

Perry Capital L.L.C. v. Mnuchin, 138 S. Ct. 978 (2018); *Fairholme Funds, Inc. v. FHFA*, 138 S. Ct. 978 (2018); *Cacciapalle v. FHFA*, 138 S. Ct. 978 (2018).

Plaintiffs filed this case in 2016, bringing both APA claims and a claim alleging that FHFA's structure violates the constitutional separation of powers. The district court dismissed the claims. ROA.946-961.

A divided panel of this Court affirmed in part, reversed in part, and remanded. Op. 53. Of relevance here, the panel affirmed the district court's order rejecting the APA claims. Like the D.C., Sixth, and Seventh Circuits before it—and the Eighth Circuit after it—the panel held that HERA bars the claims. *Id.* at 14-15. Specifically, HERA "bars courts from taking 'any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.'" *Id.* at 15 (quoting 12 U.S.C. § 4617(f)). The panel concluded that "[b]ecause the FHFA acted within its statutory authority, any potential exception to that bar does not apply." *Id.* at 15. Judge Willett dissented from the panel's ruling on the APA claim; he would have held that the Third Amendment falls outside FHFA's statutory powers. Op. 58-83 (Willett, J., dissenting).

The panel reversed the district court's order dismissing the constitutional claim, with Chief Judge Stewart dissenting from that ruling. However, the panel unanimously declined to grant Plaintiffs' requested relief of invalidating the Third Amendment. Applying Supreme Court precedent, the panel held that "[t]he

appropriate remedy for the constitutional infirmity is to strike the language providing for good-cause removal from 12 U.S.C. § 4512(b)(2)." *Id.* at 52. The panel thus "le[ft] intact the remainder of HERA and FHFA's past actions—including the Third Amendment." *Id.* at 53.

STATEMENT OF THE FACTS

In HERA, Congress authorized FHFA to place the Enterprises in conservatorship and act as their conservator "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). Congress gave FHFA as Conservator broad powers to "operate" and "take over the assets" and "conduct all business" of the Enterprises. *Id.* § 4617(b)(2)(B)(i).

In the midst of the financial crisis in 2008, FHFA placed the Enterprises into conservatorships. Op. 10. Treasury committed to provide up to $100 billion in taxpayer funds to each Enterprise to ensure solvency. *Id.* at 11. In exchange, Treasury received preferred stock with a senior liquidation preference consisting of an initial $1 billion per Enterprise, plus an amount equivalent to whatever funding the Enterprise drew from Treasury. Treasury also was entitled to annual dividends (payable quarterly) equal to 10% of the total liquidation preference, warrants to acquire up to 79.9% of the Enterprises' common stock, and a periodic commitment fee beginning in 2010. *Id.* The $100 billion ceiling on available funding was later

increased to $200 billion, and then removed altogether before becoming fixed at the end of 2012. *See id.*

As of August 2012, the Enterprises had drawn approximately $189 billion from Treasury's funding commitment. *Id*. This imposed an $18.9 billion annual dividend obligation—an amount that exceeded the Enterprises' average historical earnings per year—which they struggled to pay. *Id.* at 11-12. On August 17, 2012, FHFA as Conservator and the Enterprises adopted the Third Amendment, which altered how Treasury was compensated for its financial assistance and continuing commitment by replacing the fixed 10% dividend with a variable dividend equal to the Enterprise's net worth, less a capital buffer, and suspending the periodic commitment fee. *Id.* at 12. Thus, under the Third Amendment, if an Enterprise's quarterly net worth is negative or zero, it owes no dividend to Treasury; if an Enterprise's net worth is positive, it pays that amount as the dividend. The new formula results in a larger dividend for Treasury in some quarters compared to the prior 10% formula, a smaller dividend in others.

ARGUMENT AND AUTHORITIES

Rehearing *en banc* is "not favored and ordinarily will not be ordered" unless it is "necessary to secure or maintain uniformity of the court's decisions," or when "the proceeding involves a question of exceptional importance." Fed. R. App. 35(a). A party seeking *en banc* rehearing must state that "the panel decision

conflicts with a decision" of either the Supreme Court or this Court, or that it "involves one or more questions of exceptional importance," such as when "the panel decision conflicts with the authoritative decisions" of other courts of appeals. Fed. R. App. P. 35(b). The issues raised in Plaintiffs' Petition do not meet these standards. Rather, Plaintiffs' primary argument is that the result in this particular case was wrong. But "[a]lleged errors…in the application of correct precedent to the facts of the case" are not a basis for *en banc* rehearing. Fifth Circuit Internal Operating Procedures at 35.

A. The Panel's APA Holding Is Not Appropriate for En Banc Review

Plaintiffs do not (and cannot) claim that the panel's APA decision conflicts with any Supreme Court or Court of Appeals decision. Every court to consider the issue—including the D.C., Sixth, Seventh, and Eighth Circuits, each of which affirmed district court decisions to the same effect—has "already rejected materially identical arguments" to those raised by Plaintiffs. *Saxton*, 2018 WL 4016851, at *1. Including the panel and district court in this case, a total of nineteen federal jurists—thirteen appellate and six district judges—have rejected Plaintiffs' arguments, with only two dissenting. Significantly, the Eighth Circuit issued its unanimous ruling *after* the panel decided this case. Despite being well aware of the panel opinions here, *see Saxton*, 2018 WL 4016851 at *1 n.3, *2; the Eighth Circuit followed the panel majority and every other court decision, rather

than Judge Willet's dissent. Although Plaintiffs make much of Judge Willett's dissent and a dissent from the D.C. Circuit ruling, they cannot point to a single decision that conflicts with the panel's APA ruling.

Unable to identify a conflict, Plaintiffs rely on the purported "exceptional importance" of the APA ruling. Pet. iii, 2. They attack the ruling as detrimental to "the rule of law." *Id.* iii, 12. But the panel faithfully applied the plain text of a statute passed by Congress and signed by the President, in a manner consistent with the interpretation of every other court to address the issue. As Judge Stras emphasized in his concurring opinion in *Saxton*, the job of judges "is to follow the law wherever it leads us," not to "run to the rescue every time danger looms," and here, "clear statutory text dictates the outcome" that the Third Amendment is within FHFA's statutory authority. 2018 WL 4016851, at *4, *7 (Stras, J., concurring). Plaintiffs fail to explain how the ruling on the APA issue remotely threatens the rule of law.

Plaintiffs further speculate that the ruling will leave the Enterprises "extremely vulnerable to market fluctuations," Pet. 13 (quoting Op. 82 (Willett, J., dissenting)), with negative effects on investor confidence and the cost of capital, *id.* 13. That argument is backwards: the Third Amendment "protect[s] the entities from future market downturns or full-fledged crises." 2018 WL 4016851, at *5 (Stras, J., concurring) (citing *Perry Capital*, 864 F.3d at 607). And history itself

disproves Plaintiffs' thesis: the Third Amendment has been in place since 2012 and upheld by courts since 2014, but none of Plaintiffs' dire predictions have come to pass.

In any event, the panel's decision on the APA claims was correct. As the panel recognized, Section 4617(f) "bars courts from taking 'any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver.'" Op. 15. Plaintiffs' argument reduces to a quarrel with the premise behind Section 4617(f)—that decisions about operating and financing the Enterprises are committed to the Conservator. But "Congress could not have been clearer about leaving those hard operational calls to FHFA's judgment." *Perry Capital*, 864 F.3d at 607. "Because the FHFA acted within its statutory authority" when it executed the Third Amendment, "any potential exception to that bar does not apply." Op. 15.

Plaintiffs contend that FHFA acted outside its statutory authority because HERA purportedly imposes a "plainly mandatory" duty on FHFA as Conservator, Pet. 10, to take actions "necessary to put the [Enterprises] in a safe and sound condition" and "appropriate to carry on the business of the [Enterprises] and preserve and conserve [their] assets and property," *id.* 8 (quoting 12 U.S.C. § 4617(b)(2)(D)). But every court to consider this issue has agreed that "the most natural reading of [HERA] is that it permits FHFA, but does not compel it in any

judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the companies to private operation." *Perry Capital*, 864 F.3d at 607; *Saxton*, 2018 WL 4016851, at *3; *Robinson*, 876 F.3d at 232; *accord Roberts*, 889 F.3d at 403. "This reading is supported by the fact that Congress also used mandatory 'shall' language in the same section." *Saxton*, 2018 WL 4016851, at *3 (citing 12 U.S.C. §§ 4617(b)(2)(E), 4617(b)(2)(H)).

Plaintiffs contend that the use of "may" implicitly means the Conservator "may not" do anything to the contrary. Pet. at 9-10. This argument both disregards the ordinary meaning of the word "may," and obliterates any distinction between Congress's use of "may" in some parts of Section 4617 (over fifty times) and "shall" in others (over one hundred times). *See Saxton*, 2018 WL 4016851, at *5 (Stras, J., concurring). "Under the whole-statute and consistent-usage canons, there is no reason to doubt that the powers-as-conservator provision uses 'may' in its normal, permissive sense, consistent with the rest of the statute." *Id.* (Stras, J., concurring). The panel, like every other court to consider the question, correctly treated HERA's use of "may" as permissive.

Even if "may" was a mandatory term, Plaintiffs' argument would still fail because the Third Amendment protects the Enterprises' safety and soundness and preserves and conserves their assets by ensuring an ongoing financial lifeline from Treasury. *See, e.g.*, *Roberts*, 889 F.3d at 404-05 ("The Third Amendment

permanently eliminated the risk that cash-dividend payments would consume the companies' financial lifeline, and it forever prevented Treasury from demanding payment of commitment fees."); *Robinson*, 876 F.3d at 232 ("Treasury's continuing funding commitment guarantees that the Companies will remain solvent."). "The Net Worth Sweep was among a range of actions 'suitable' for preserving and conserving assets, well within the discretion granted to the FHFA under the statute, even if the shareholders would have preferred a different course of action." *Saxton*, 2018 WL 4016851, at *6 (Stras, J., concurring).[1]

Plaintiffs also criticize other courts' reliance on HERA's provision that FHFA may "take any action authorized by this section, which [FHFA] determines is in the best interests of the [Enterprises] or the [FHFA]." Pet. 11 (quoting 12 U.S.C. § 4617(b)(2)(J)). They argue that this provision is limited to powers "authorized by this section" and does not give FHFA "free-wheeling authority" to act as it pleases. Pet. 11 (quoting Op. 75 (Willett, J., dissenting)). But Plaintiffs' argument rests on two premises: that all powers in § 4617 constitute mandatory duties, and that they forbid the Third Amendment. As discussed, neither is correct.

[1] Plaintiffs cite various FHFA statements that Plaintiffs characterize as describing the Conservator's powers as mandatory. Pet. 10-11. But the same argument has been presented to all the other courts, and no court has accepted it. The question is whether these powers are binding in a "judicially enforceable sense," *Perry Capital*, 864 F.3d at 607, not how FHFA has described them in other contexts.

"Picking among different ways of preserving and conserving assets, deciding whose interests to pursue while doing so, and determining the best way to do so are all choices that [HERA] clearly assigns to the FHFA, not courts." *Saxton*, 2018 WL 4016851, at *7 (Stras, J., concurring).[2]

Finally, the panel's decision does not blur the "distinct" roles of conservators and receivers. Pet. 8-9. HERA permits these roles to overlap, allowing FHFA to "be appointed *conservator or receiver* for the purpose of *reorganizing, rehabilitating, or winding up* the affairs of" the Enterprises, 12 U.S.C. § 4617(a)(2) (emphases added), and granting many of the same powers to the "conservator *or* receiver," *see, e.g.*, *id.* §§ 4617(b)(2)(A), (B) (emphasis added). In any event, the Third Amendment does not liquidate the Enterprises, which "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Perry Capital*, 864 F.3d at 610-11. To the extent Plaintiffs contend that

[2] Plaintiffs argue that Section 4617(b)(2)(J) is limited by an implied understanding that FHFA must act as a traditional common-law conservator. Pet. 12; *see also* Op. at 69 (Willett, J., dissenting). But HERA enumerates conservatorship and receivership powers and duties in detail, demonstrating that Congress did not expect courts to resort to common-law analogies. As the D.C. Circuit put it, "Congress made clear in [HERA] that FHFA is not your grandparents' conservator." *Perry Capital*, 864 F.3d at 613. Here, "clear statutory text," not common law, "dictates the outcome." *Saxton*, 2018 WL 4016851, at *7 (Stras, J., concurring).

FHFA cannot "wind[] up" the Enterprises through steps short of liquidation (like shrinking the Enterprises' operations until an ultimate resolution is determined), every court to consider this argument has rejected it. "Undertaking permissible conservatorship measures even with a receivership mind" is not outside of the Conservator's "statutory bounds," *Perry Capital*, 864 F.3d at 612; *accord Roberts v. FHFA*, 243 F. Supp. 3d 950, 962 (N.D. Ill. 2017), *aff'd*, 889 F.3d 397; *Robinson v. FHFA*, 223 F. Supp. 3d 659, 670 (E.D. Ky. 2016), *aff'd*, 876 F.3d 220.[3]

B. The Separation-of-Powers Remedy Question is Not Appropriate for En Banc Review

The panel's decision that the remedy for the alleged constitutional violation was to "strik[e] the offending provision from HERA" (Op. 53), rather than invalidate the Third Amendment, also does not warrant *en banc* review. That unanimous holding conflicts with no decision of the Supreme Court, this Court, or another Circuit, nor does it involve a question of exceptional importance. Rather, it applies settled and straightforward law.

[3] Plaintiffs cite dicta from *McAllister v. Resolution Trust Corp.* for the proposition that "a conservator only has the power to take actions necessary to restore a financially troubled institution to solvency," Pet. 9 (quoting 201 F.3d 570, 579 (5th Cir. 2000)), but do not argue there is a conflict worthy of this Court's review. In any event, *McAllister* does not conflict with the panel decision. *McAllister* simply held that employee benefits provided by a conservator were not "expenses of liquidation" for purposes of determining the priority of a claim against a succeeding conservatorship, because conservators lack the power to liquidate the institution's assets. Here, as *Perry Capital* held, there has been no liquidation.

1. The panel's approach closely tracks the Supreme Court's disposition of *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), its most recent case addressing removal-restriction claims and the template for Plaintiffs' claim here. While *Free Enterprise Fund* invalidated the unusual double removal restriction presented there, the Court declined to invalidate actions taken by the PCAOB while that removal protection was in effect. To the contrary, the Court "reject[ed]" the plaintiffs' argument that the removal restrictions rendered "all power and authority exercised by [the Board] in violation of the Constitution." 561 U.S. at 508. It was not "the existence of the Board" that "violate[s] the separation of powers," but the particular removal restrictions in the statute. *Id.* at 508-09. "When confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem," so the appropriate remedy is simply to strike down the problematic provisions to avoid constraining the President's powers going forward. *Id.* at 508 (citation omitted); *accord John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).[4]

[4] Even the principal dissent in the D.C. Circuit's *PHH* case agreed that this is the correct remedial approach when removal restrictions are found to cross constitutional lines. *See PHH Corp. v. CFPB*, 881 F.3d 75, 198-200 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Plaintiffs conceded below that, in accordance with *Free Enterprise Fund*, "if [they] prevail on the merits of their constitutional arguments the Court should consider excising HERA's for-cause removal provision rather than invalidating in their entirety the provisions of HERA that create FHFA," *i.e.*, exactly what the panel ended up doing. ROA.530.

Plaintiffs purport to distinguish *Free Enterprise Fund* and *John Doe* on the ground that they "concerned ongoing agency investigations," as to which "vacatur was unnecessary because an agency's final decision on liability ratifies a flawed decision to begin an investigation or bring charges." Pet. 15. That explanation is illogical and finds no support in the cases. Far from considering vacatur "unnecessary," the plaintiffs in *Free Enterprise Fund* and *John Doe* specifically asked the courts to vacate or enjoin discrete actions the agency had taken or was taking against them as part of the investigations. The courts squarely rejected those requests—not out of speculation about possible future ratification, but due to "traditional constraints on separation-of-powers remedies." *John Doe Co.*, 849 F.3d at 1133. In any event, to the extent a prospect of future ratification means the agency action should not be vacated, Plaintiffs fail to explain how that is inconsistent with the panel's holding.

2. Contrary to Plaintiffs' assertion, the panel's approach is not at odds with *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). In *Lucia*, the Court held that the method the SEC used at one time to appoint ALJs violated the Appointments Clause. There, "the 'appropriate' remedy for an *adjudication* tainted with an *appointments violation* is a new 'hearing before a properly appointed' official." *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188

(1995)) (emphasis added).[5] It is logical that actions by individuals not validly appointed—who arguably lack power to hold office at all—may be subject to vacatur, though typically the *de facto* officer doctrine insulates past agency actions *other than adjudications* from such attack. *See Ryder*, 515 U.S. at 180-83.

This case, however, involves neither an Appointments Clause challenge nor an adjudication. Unlike *Lucia* and *Ryder*, no court has held that a years-old financial transaction by an agency must be unwound because the agency's leadership had protection from removal that was later found to cross a constitutional line. Indeed, *Free Enterprise Fund* makes clear that the agency's past actions are *not* rendered invalid in that situation. It is Plaintiffs' approach, not the panel's, that conflicts with Supreme Court precedent.

Plaintiffs' reliance on *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014), and *Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 333 (5th Cir. 2014), is similarly misplaced. Those cases also were appointments challenges to adjudications, which were rendered invalid because without improperly appointed members, the NLRB "did not have [the] quorum" needed "to lawfully take action." 705 F.3d at 493. FHFA does not need a quorum, and limitations on the President's removal power (whether constitutionally

[5] The *Lucia* Court declined to grant certiorari on or otherwise address the type of constitutional claim made in this case, namely "whether the statutory restrictions on removing the Commission's ALJs are constitutional." 138 S. Ct. at 2050 n.1.

problematic or not) have no bearing on that official's power to act. *See Free Enterprise Fund*, 561 U.S. at 508 (observing that removal-restriction issue solely "affects the conditions under which those officers might someday be removed" and "ha[s] no effect…on the validity of any officer's continuance in office").

3. Plaintiffs also insist that "[t]he panel's remedy conflicts with administrative practice" of the NLRB and FEC. Pet. 14-15. That is not so, but regardless, conflict with two unrelated agencies' administrative practice is not the type of conflict that would render this issue worthy of *en banc* attention. *Cf.* Fed. R. App. P. 35. Plaintiffs also do not claim the "serious doubt" they perceive about the panel's severability analysis, Pet. 14 n.3, raises any conflict with other appellate court decisions or is of exceptional importance. There is simply no reason for the *en banc* Court to review the panel's unremarkable remedy holding.

CONCLUSION

The Court should decline to grant rehearing *en banc* on the issues raised by Plaintiffs.

Dated: September 13, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2018, I electronically filed the foregoing with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify the following:

This paper complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) because it contains 3,826 words, excluding the parts exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: September 13, 2018

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